UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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RIO TINTO PLC,

Plaintiff,

v. 14 Civ. 3042 (RMB) (AJP)

VALE, S.A., et al.,

Conference

Defendants.

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New York, N.Y.
February 6, 2015
2:00 p.m.

Before:
HON. ANDREW J. PECK
Magistrate Judge

APPEARANCES

QUINN EMANUEL URQUHART & SULLIVAN LLP
Attorneys for Plaintiff
BY: ERIC C. LYTTLE
MICHAEL J. LYLE
KEITH H. FORST

CLEARY GOTTLIEB STEEN & HAMILTON LLP
Attorneys for Defendant Vale, S.A.
BY: JONATHAN I. BLACKMAN
SCOTT B. REENTS

MISHCON DE REYA LLP
Attorneys for Defendant BSG Resources Limited
BY: VINCENT FILARDO

SULLIVAN & WORCESTER LLP
Attorneys for Defendant Mahmoud Thiam
BY: NITA N. KUMARASWAMI
ANDREW T. SOLOMON

MARTIN J. AUERBACH
Attorney for BSG Resources defendants

(In open court; case called)

THE COURT: Good to see the usual cast of thousands here. For any client who reads the bill, and there aren't full appearances, I'm exaggerating quite a lot, but it's a large number of people.

With respect, first of all, to the BSG and related issue about a stay of discovery, the answer is Judge Berman has ruled and so if you want to make a motion for him to reconsider it, that would be an application that goes to Judge Berman, not to me.

MR. FILARDO: Your Honor, could I be heard briefly on this.

Your Honor's rulings have been consistent to this point, that until the Court has determined personal jurisdiction over BSGR and Mr. Steinmetz, that merits discovery wouldn't go forward against them. I don't think that Judge Berman's scheduling order is necessarily inconsistent with your Honor's rulings.

THE COURT: It is because he ruled at the last conference that everything would go forward. And to make sure there wasn't a miscommunication, I have spoken to him. And so you are getting this both from me and, through me, from him that if you want relief from that you need to make the appropriate application to him. I'm out of it.

MR. FILARDO: Understood, your Honor, but if I could

just point out for the record that Judge Berman's order, how it differed from the order that -- the proposed scheduling order that the parties had agreed to and submitted to your Honor, at least in relevant part how it differs, is in paragraph three where it states: Item No. 7 is not contingent upon any pending or impending personal jurisdiction motions.

And when you look at item No. 7 of that order, and of course this is the January 16, 2015 scheduling order of Judge Berman, No. 7 says discovery deadlines include any Hague Convention discovery not vice versa.

I think, as your Honor knows, we've been participating in discovery. It's been limited jurisdictional discovery up to this point, of course, not merits. We've complied with your Honor's rulings. We've produced the Steinmetz declaration which refutes all of these specific allegations of general jurisdiction and minimum contacts that were made against my client. And we've also responded to plaintiffs' jurisdictional discovery requests in accordance with your Honor's orders and the scope of that discovery. And there were no documents that were produced that tend to show any jurisdiction over my client.

As your Honor pointed out the last time we were before you, that given the deadlines, and that given that Judge Berman would likely not extend them -- and I think that's what was clear in this order, that he didn't want to extend them despite

any jurisdiction --

THE COURT: Not only was he not extending the deadlines, he was dialing them back at least a little bit.

MR. FILARDO: Correct.

And your Honor had pointed out, as you anticipated that he wouldn't do that, that the parties should start thinking about how to conduct either nonparty discovery, whether it's under the Hague or whether it's under letters rogatory through the federal rules.

What Judge Berman didn't rule upon was -- although he stated at the end of the conference, and he stated that he thought that it would include merits discovery, what he stated here in his scheduling order, in paragraph No. 3 -- what he didn't rule on was how that would -- how merits discovery would be participated in by my clients. Would it be that they had to object pursuant to the federal rules? Or would it be that they would object and say that the Hague Convention should apply?

Your Honor had suggested was that the parties discuss looking at this as a nonparty discovery under the Hague or under appropriate rules that would apply. And I think that that certainly wasn't ruled upon by Judge Berman.

THE COURT: That's not the application that was made in your letter to me.

MR. FILARDO: The application that was made was in light -- because we feel that, although we don't believe Judge

Berman intended it, we feel that --

THE COURT: Let me be clear. Judge Berman intended it. And obviously you can --

MR. FILARDO: I don't think Judge Berman intended to prejudice us by putting these deadlines in the order.

The reason of our application was because, if we were to keep our objections and we were to not participate in affirmative discovery and argue to your Honor, as we think is appropriate, that discovery against us should proceed either as nonparty or party under the Hague, that there could be a possibility of prejudice here given the deadline.

THE COURT: Mr. Filardo, let me be clear.

If you're asking for a stay, that has to go to Judge Berman. If to the extent that he has already ruled against a stay or future rules against a stay, that puts you between a rock and a hard place. If I said you have my sympathies that doesn't resolve anything. My hands are tied. And you then have to make the decision of whether you want to object to any discovery under U.S. discovery rules and say you're going to roll the dice and hope that you are correct that there is no jurisdiction against you here and you're going to get knocked out of the case; and if not, you're not going to have any defensive discovery for you except what you get through the requests made by other defendants that may enure to your benefit. Or you're going to work things out appropriately with

the plaintiffs and anyone else -- other defendants who may take discovery against you to make it as convenient as possible in terms of occurring elsewhere.

Right now we are still at the point where we're talking about documents. Obviously, if we're talking about a deposition and the place of a deposition, that is something that may not get -- we may not ever get to that point before the motion is decided upon.

MR. FILARDO: That's where I was going, your Honor. I understand fully that if we're going to make -- we understand your Honor's ruling, that if we have to make this stay motion that we must do it before Judge Berman. But that's exactly where I was going with this, is that the scheduling order, nor does the commentary at the end of the conference before Judge Berman make a ruling as to how we're supposed to proceed as to merits discovery. It doesn't say we have to proceed under Rule 30, Rule 33, Rule 34.

THE COURT: Are you ready to make an application or not? You seemed to be indicating at the start of this that --

MR. FILARDO: Essentially what I don't want to be in a position is that -- plaintiffs had already served both document requests and interrogatories on us. As you know, the only statement my client ever made in court is that the court doesn't have jurisdiction over us. And the interrogatories are particularly troublesome. So we're at a point now if we're

going to object --

THE COURT: Stop. Stop. Stop.

I appreciate you've got to make a decision. I'm not a big fan of interrogatories. I will give you that little freebie right now. So, if you have documents, and there was at least a comment in one of plaintiff's letters that at least as to certain documents you already have them all together, or some such -- parties always think the other side is more ready than perhaps they are. But you can produce documents because documents, many of which -- well, this is old enough, it may be paper. But even so, it is something that can be moved easily from one place to another, whether in bits and bytes or on pieces of paper. You'll have to make that decision as to what road you want to go down. And whether it's today or the next conference, if you want to object to all their discovery and say it's your position that they must go via the Hague Convention, and you letter brief it, I'll deal with it. I'm not going to take much more time now until you're ready to tell me that you have gotten your client's instructions and you are prepared to do X or Y and you want a ruling.

MR. FILARDO: Thank you, your Honor. I'll just do it -- then let me reserve our rights to make those objections that this discovery, if it was to proceed, would proceed under the Hague Convention. And if we would make that application we'll do it in writing.

THE COURT: Do it sooner rather than later. Don't wait until the 30th day. I don't remember when they served you. But in fairness -- although I have already indicated to the plaintiffs they too might want to consider immediately going to the Hague, but I would not consider it fair play to wait until the 30th day or indeed get an extension of that 30th day and then just say: General objection to everything you've asked, we think we're not subject and, therefore, you've got to go Hague. I'm not going to look upon that kindly.

MR. FILARDO: I will do it much sooner than later, your Honor.

THE COURT: One last point just to be sure if there is any doubt Judge Berman asked me to clarify with you that your motion for lack of personal jurisdiction has to be incorporated within the master motion to dismiss that Judge Berman has scheduled and given page limits on.

MR. FILARDO: There is no doubt, and it has been. It will be submitted, fully submitted.

THE COURT: Very good.

MR. LYLE: Your Honor, Michael Lyle for Rio Tinto.

THE COURT: You can snatch defeat from the jaws of victory but, yes.

MR. LYLE: All I'm asking your Honor is that with respect to the six thousand documents that BSG defendants have acknowledged that they have and reviewed, that if we could have

a date for them to begin production of at least those documents.

THE COURT: They haven't decided yet whether they are going to do that or not.

MR. LYLE: That's why I'm suggesting if we get a date, your Honor, so that they can then make a decision one way or the other.

THE COURT: Let's do it a different way.

Mr. Filardo, when will you be prepared to have gotten the advice of your client and perhaps taken a run at Judge Berman.

MR. FILARDO: Within a week, your Honor.

THE COURT: Excuse me?

MR. FILARDO: By a week from today.

Let me clear something up for plaintiff's counsel on the 6,000 documents. Your Honor, as you know, the limited jurisdictional discovery that we were engaging in was also under very broad search terms, including the term Fred and Florida. The only reason why we even came up with six thousand documents was because of those broad terms. These things are completely irrelevant. The only hits that we did get in the things that we produced were when the actual name Fred Cilins came up in a news article.

THE COURT: All of this -- we've now taken 20 minutes on an issue that I thought would take three to say, "Not me,

Berman." So a week from today you will tell them what you're doing not only on those six thousand documents, if there are six thousand documents, but whether you are engaging in paper discovery, and by that I mean nondeposition, under U.S. rules, or Hague Convention, or any other variation. Can we now move on to the agenda item.

MR. LYLE: Thank you, your Honor.

MR. FILARDO: Thank you, your Honor.

THE COURT: Okay. As to the discovery request from defendant Thiam, whose name I'm sure I'm mispronouncing, how soon can you get the documents to the government of Guinea?

MS. KUMARASWAMI: Nita Kumaraswami for defendant Thiam, your Honor.

We are nearing completion of our review, and it is our hope to get them to the Government of Guinea on or around the 13th, which would allow them a week to get back to us, which they represented would be ample time to review these documents.

THE COURT: I take it that is acceptable to the plaintiffs?

MR. LYTTLE: Yes, your Honor.

THE COURT: So ordered.

MS. KUMARASWAMI: Thank you, your Honor.

THE COURT: We've already dealt with II, which is the BSGR Steinmetz.

III. VBG.

Is VBG prepared to go to the government to do I guess what is the equivalent of a FOIA application and get back copies of your documents.

MR. AUERBACH: Good afternoon, Judge Peck.

Martin Auerbach.

Plaintiff's counsel has been kind enough to identify for me U.S. counsel representing the government of Guinea. I am in the process of connecting with him. Once I've connected with him, I will go back to my clients in Guinea and explain to them what this process is. I assume I'll get direction from them to go ahead and make that request.

THE COURT: How soon will you be in a position either to make the request or inform plaintiffs and the Court that your clients will not for some reason.

MR. AUERBACH: I don't think I'll be speaking to U.S. counsel for the Guinean government today. I assume that this will carry over until early next week. As soon as I have spoken with them, I will reach out to the clients.

Plaintiff's counsel understands, and they've been very understanding about the fact, that it's been extraordinarily difficult to communicate with my clients. The management of the Guinean company is currently in Paris. After the terrible events in Paris, I couldn't get through to them. Hopefully, I can get through to them now much more readily. And so by the end of next week I should certainly have an answer. And if the

answer is that this is a fairly simple and straightforward process, which I'm hoping it will be, I assume your Honor would encourage me to encourage them to go forward in that respect.

THE COURT: That's for sure. So status report by next Friday to the plaintiffs.

MR. AUERBACH: Sure.

THE COURT: You don't need to copy me on that. If that creates a problem between you and them, one or the other of you will let me know.

MR. FORST: Your Honor, if I may. Just one thing on that point.

THE COURT: Just remind me of who you are.

MR. FORST: Keith Forst with Quinn Emanuel on behalf of Rio Tinto.

I just wanted to relay, and I relayed this to counsel for VBG, that Scott Forman, counsel for the Guinean government, conveyed to us, which we conveyed to him, that any request by VBG to the Guinean government would be, in his expectation, acted on promptly and responded to right away. So we've communicated that too. So they're aware of it and that it's coming and ready to act on it.

THE COURT: Good. Excellent. And the other part of the letter is that Rio Tinto is awaiting answers to certain questions.

MR. AUERBACH: And Mr. Forst and I have been talking

about that, and talking about ways to try to find answers to interrogatory questions. It principally has to do with first what the universe --

THE COURT: Let me stop you. In an effort to keep all this short. Is there any dispute, or you're comfortably working together?

MR. FORST: We're comfortably work, your Honor. However I asked Mr. Auerbach if we could get a date certain by which he would amend those interrogatories. I proposed by the end of next week.

MR. AUERBACH: I think realistically two weeks for that. And since it's looking forward to people to depose, and that's not going to happen until July, I think --

THE COURT: But it's also looking for documents and where the computers went.

MR. AUERBACH: Judge, I've already told them that.

THE COURT: Is two weeks from today acceptable?

MR. FORST: We'll take it.

THE COURT: So ordered. Move on.

MR. FORST: I'm sorry. The very last thing is counsel for VBG also helpfully pointed out that there are 20 boxes of hard copy documents left in their offices in Guinea that have since been abandoned. So we've asked him to look into getting access to those documents, to get them shipped. We also have identified, through our client, that there are people there in

Guinea who can assist in that effort to get those documents. Those weren't seized by the government but remain on the premises. So we would request that those documents be scooped up first chance and at least shipped back to him for review and production.

MR. AUERBACH: I am trying to coordinate with the clients on the status of those. And I will have the status on that by the end of next week as well -- two weeks.

THE COURT: Well let's get the documents -- unless there is a reason the documents can't leave the country, let's get them shipped to you immediately so that they're here by the two weeks from today, and then you can fight over content and you could even talk about who is going to split the shipping cost or whatever. But let's try to get this moving.

MR. AUERBACH: Fine, your Honor. The health situation in Guinea continues to be a really serious obstacle, and I'm working around it.

THE COURT: Two weeks is the deadline. And if there is a problem you'll need to get relief from the plaintiff; and if not from the plaintiff, from the Court.

MR. AUERBACH: Thank you.

MR. FORST: Thank you, your Honor.

THE COURT: I guess now is the time for the predictive coding protocol. And could the e-discovery gurus on each side stand up and tell me who they are and where they're from.

Start with the plaintiff.

MR. CHAN: Kinny Chan from Precision Discovery.

MR. LAND: Jonathan Land from Quinn Emanuel.

THE COURT: Okay.

MR. REENTS: Scott Reents from Cleary Gottlieb.

MR. SIKORSKI: David Sikorski from Deloitte.

THE COURT: Okay. So let me ask you this. Have you decided at this point, on each side, which vendor or which TAR -- I'm using TAR and predictive coding synonymously -- whose product you're using.

I'll start with the defense. I know Deloitte doesn't have a product of its own per se, at least I think that's correct. You, as a service provider, use the tools from others.

MR. SIKORSKI: Correct we use open source algorithms.

THE COURT: Which means what?

MR. SIKORSKI: They're publicly available algorithms that are usually behind these other products.

MR. REENTS: If you're looking for a name, they brand it under Deloitte Dynamic Review.

THE COURT: I was wrong. It is essentially your own.

Is it an SPL, SAL or CAL as those acronyms are now used. If you need me to translate, by all means.

MR. SIKORSKI: It approaches CAL.

THE COURT: On the plaintiff's side.

MR. CHAN: From Precision Discovery, we use Relativity Assisted Review by kCura.

THE COURT: Is that continuous active learning or something else?

MR. CHAN: It's not continuous active learning. It's simple learning.

THE COURT: Simple passive or simple active?

MR. CHAN: Simple passive learning.

THE COURT: The problem I see, among others, and this could be the first time you've all agreed on something and I hate to be a problem where there is agreement but the protocol, perhaps because it had to cover two different types of products, does not necessarily make sense to me. If you all want to give me any background and address that in any way; otherwise, I can tell you like one or two of the specifics I see as being problematic. And if you all want to tell me I should mind my own business, you've agreed and leave you alone, I'm happy to do that as long as the understanding then is that I'm not going to get all sorts of motions as you go through this as to they miscoded 35 of the 50 documents in this seed or whatever.

MR. REENTS: Your Honor, I think I can give you background on the protocol and our thinking. You're right. We wanted to design a protocol that was, as much as possible, agnostic as to platform so the parties could use a different

platform, and didn't micromanage the process that was used. I think those two things go together. At the same time we felt it was very important for each side to make adequate disclosures so that each side could evaluate the reasonableness of the other side's process.

THE COURT: Would it make sense, now that you all know -- maybe you knew it before I asked you to stand up and tell me, maybe you didn't -- would it now make sense to go back and very quickly do a protocol that says plaintiff is using kCura's Relativity platform and therefore, as to it, the following procedures apply; while Vale is using Deloitte's Continuous Active Learning tool and, therefore, this slightly different protocol applies.

MR. REENTS: My view, your Honor, is that that's not necessary. We've confirmed with our vendors that nothing set forth in the protocol is inconsistent with the way that their process works. And in any -- in any review process, in particular with predictive coding TAR, you need some flexibility because you can't set forth with certainty at the start exactly how it's going to progress. So that's also sort of an important feature, I would say, not a bug of the way we designed the protocol but a deliberate feature.

MR. LYTTLE: I agree with Mr. Reents' description of how the protocol came to be. We did want it to be agnostic. Our goal was to have a very opaque and sharing, open process

with how decisions were being made. I do think now that we have decided exactly which technologies are going to be used, I do think there's some detail could be added. I'd ask Mr. Chan to weigh in on the detail that we might propose to add, which I think is what your Honor is after.

THE COURT: At this point TAR, as I think you all know, is something that I'm very interested in. On the other hand, if there are things you haven't negotiated that now you think you could and should, I'd rather not do that in open court, both as a matter of taking up my time and as a matter of fairness to all of you. You did a very good job of coming to an agreement, even if it's an agreement that I think may be somewhat problematic.

Let me just tell you as I understand it and I don't know -- I know very little about each specific tool under a brand name or under Deloitte's name. I know about it in the simple versus continuous and all of that.

As I understand it, in a Continuous Active Learning tool, they're really after the training set. And here you seem to have a seed set and a training set and etc. And for, as I understand it, for Continuous Active Learning you train and, therefore, may be important to see what the documents of the training set are but thereafter it bubbles up to the top the most responsive documents and those are continuously marked as either relevant or not relevant. And even the ones that are

marked not relevant will come back again in subsequent rounds if the computer algorithm, as it's retrained, thinks that you made a mistake. Is that about right and is that the way Deloitte's version of CAL works?

MR. SIKORSKI: That's essentially, yes.

THE COURT: While a Simple Passive Learning tool has much more of a -- seed sets are much more important.

MR. CHAN: If I may, Simple Passive Learning, you can use some of the technology or some of the functions that you see in Active Learning. So one thing with Simple Passive Learning, you do see ranking of relevancy. So it's all about how you select the seed sets. So I think some of these are the details that counsel is talking about that we want to work through. So there is some commonality here that we can work with in terms of the protocol.

THE COURT: It's just some of the statistically valid sample arguments here, or whatever, sound like the sort of thing that you could better document.

I mean either you're using the usual sample generator, so it's 2,399 documents, or whatever the other variant along those numbers that the tool spits out, which is really somewhat different than a 95 percent confidence level, plus or minus two percent. I mean there are just certain of the ways things are described here. And it may be that you all know what you're talking about and probably, I hope, know what you're talking

about, at least the vendor folks or consultant folks better than I do. However, I'm not sure that some of the things you've described here necessarily make sense. In other words, I'm having some trouble figuring out whether you've got a control set and then a seed set or you're talking about two different seed sets and --

MR. REENTS: Your Honor, would you like us to explain the difference?

THE COURT: Sure.

MR. REENTS: The sample set, to start, serves two purposes; one is to understand the prevalence of various issues, responsive issues within the document population; and the second is to serve as a control set, to measure the training process. This is, at least, as I understand that dynamic.

MR. SIKORSKI: Correct.

THE COURT: That's different than the seed set?

MR. REENTS: The seed sets which are used in the training process are an attempt to find responsive documents in order to train the system. And then the model is developed through that process. And the model is constantly tested against that sample set that you've done in the beginning.

MR. CHAN: Your Honor, that's the same methodology that we apply using Simple Passive Learning through our process.

MR. LYTTLE: Your Honor, maybe there's a middle ground here where we don't blow the protocol up, so to speak, where we can exchange letter or something giving this level of detail around how this protocol specifically will be implemented among the various review platforms.

THE COURT: I'm happy to do whatever you all think. One possibility is for me not to sign this and for you all to keep working -- you each sign it and -- because I'm both worried about what you're all doing and also, frankly, there are so few -- there are enough cases out there on predictive coding, but there are not too many protocols. And certain protocols then wind up taking on a greater life. And I know you're only interested or largely interested in your case, not the development of the law on TAR, but there are certain things that I would have some concern about signing.

The other thing that I'll raise with you right now is unless you have a very good common understanding of scope there can be problems from -- I'm glad you've agreed, let me try to phrase this positively as opposed to only negatively -- I'm glad you've agreed on a protocol. I'm glad you've agreed on a fairly high degree of transparency and certainly a very high degree of cooperation. All of those are wonderful. What I don't want to have coming to me is in each round or in even the first seed set round of the 2,399, or whatever your number generator gives you for your sample in that ilk, I don't want

five hundred of those documents brought to me for a long conference with the plaintiff saying we've marked these as nonresponsive and the defendant saying 90 percent of them should be marked responsive or vice versa here.

If you all are confident that this all is going to work and you understand the scope of what's in discovery and what's not in discovery so that the transparency and review of nonresponsive nonprivileged documents is merely to give you confidence in the process and that no one is trying to game the system, I'm okay with that. I'm not okay with having to referee disputes on that to much degree.

MR. LYTTLE: Understood, your Honor. I think we both have expressed those concerns, as well, in discussing how we implement this transparency. In conjunction with this predictive coding protocol, both parties have put the source down a little bit. We're pretty close to finalizing everything but a few outstanding issues on scope. Both parties have exchanged proposals. And we think we're going to reach agreement on that.

So we've been operating in parallel on the scope and the predictive coding. I can't promise you there won't be disputes. I'm hopeful we all start coming to an understanding on the proper scope in parallel with this and that will limit those disputes that you've just noted.

As far as the protocol, I do think as long as these

concepts of transparency and openness stay in the protocol, I think we can go back and think about adding some of these details in to get a protocol that provides the level of specificity that you're after.

If you could help us though -- you've mentioned a couple times now you've got a couple concerns. I think you've mentioned one of them. Are there any others that we could focus on so that what we present to you next time is more in line with what you're after?

THE COURT: I'll go through some of the other details. Your definition of precision talks about responsive by the software. Are you really talking about measuring precision at that point or after the attorney review of the responsive documents?

I don't need answers to these as we stand here. That was a concern.

Instead of defining statistically valid sample, if you're agreeing that a sample for whatever purpose is 2399 or 2405 or whatever the magic numbers the various vendors throw out at the conferences about TAR all the time. Just do it. If it is not something that is just the random number generator but is a percentage of the corpus or something that you won't know it now, then that's a different story. But that's generally not the way the sample goes for validation and other purposes including above the control and seed set.

On Paragraph 4(a) I'm not exactly sure what you meant by sampling of the excluded documents. Because that's prior to sample set review. Does that mean you're reviewing documents that -- you're sampling documents that weren't collected? You're sampling documents that were collected but are eliminated from predictive coding review by deduping or exclusion of everything that comes up as at ESPN.com, at EBAY.com or whatever are the other junk extensions. I just didn't understand that.

There's some of the stuff on page four, paragraph (d) training where you're talking about disagreeing with categorization and things like that. And I'm not sure whether that is based on a hard yes or no, it's relevant or it's not relevant versus how that works with a TAR method that ranks the documents from a hundred percent likely to be relevant to zero percent.

You're doing a lot of things with producing nonresponsive material, but not the responsive, which makes sense in one sense, because you're going to get all the responsive documents from the training set, seed set, and later sets as part of a big production, but it's not necessarily helping you all decide whether the system was adequately trained. Again, you may be okay on that. You may not.

Page five. Paragraph 4(e). When you say uncategorized documents, are you meaning things that were

exceptions that don't work in TAR at all like pictures, architectural drawings, mine shaft drawings, whatever would be the appropriate analogy here? Or are you talking about documents that the predictive coding software said: Beats the heck out of us, we can't tell whether this is responsive or nonresponsive because we haven't been trained enough.

That and what I've already talked about, about differences between control sets, seed sets and the like, I think covers most of the issues I had here. So what I would suggest, unless you all want to do it differently, is that you take one more crack at this, disclose as part of this in the preamble or whatever what system you're each using and how you would characterize it as simple, active, passive, continuous, etc.; fix the other issues to the extent you think it needs fixing or at least clarification, and then submit it for me and, as I say, I will probably accept it if you're in agreement. I just hope that we're not just creating problems down the road.

Anyone have any different thoughts?

MR. LYTTLE: That makes sense to us, your Honor.

MR. REENTS: Yes, makes sense to us.

THE COURT: A week from today. Does that give you enough time? A little less, a little more? What's your pleasure?

MR. LYTTLE: I think it would keep us moving.

MR. REENTS: That would be fine.

THE COURT: A week from today I'll expect a new protocol with a cover, you know, probably better if you explain it all, anything you're answering my question on without necessarily changing things in the protocol itself by a footnote or something, but if you want a cover letter that's an agreed cover letter explaining things, that's fine too.

I think with that we have covered everything in your letter. Maybe. Tell me if I've skipped anything there.

MR. BLACKMAN: The only thing left, and it's not something we need to linger on here, is in the portion of the letter, Roman V, deals with Vale's request for discovery from Rio Tinto. They now have produced the investigative reports. We've noted, and we've already informed them that some of those reports don't have dates which is significant, given the reason they're being ordered to be produced. And at least one doesn't indicate who prepared it. And we've asked them to give us that information. I can't imagine there's an objection. But just for the sake of good order I'd like to have it agreed on the record, or otherwise directed by the Court, that they do that in a week.

MR. LYTTLE: Yes, your Honor. They did send a letter Wednesday or Thursday. I hoped to talk about it before the conference. Unfortunately because of traffic I didn't make it. Long story short. Yes, we will give that. We propose to treat

that as an interrogatory. We won't take the full 30 days. We won't make them to serve it as an interrogatory. We will get back to them as soon as we can but we do need to run some traps with our clients about identifying the names of particular contacts at investigators.

THE COURT: Well that's a different story, I thought. I thought there -- there may be two parts. There's the redaction question. But just the dates and who prepared and by who? Do you mean Mr. Holmes or do you mean the Pinkerton Investigative Agency, when you say who prepared the report that doesn't show who prepared.

MR. BLACKMAN: I'd like to know both, but I'll start with just the entity. At least one of these reports just doesn't indicate whether it's from --

THE COURT: Any reason you can't get that all squared away within a week?

MR. LYTTLE: No. We can do that, your Honor.

MR. BLACKMAN: Then you moved on to the question of the redactions. We're going through those. Frankly, we don't necessarily accept the redactions particularly since some of these people may turn out to be fact witnesses. And without some more clarity about vague concerns about security and so on, I don't think it's fair for them just to redact sources of discoverable information.

THE COURT: Let's take that in two pieces.

Are any of the confidential informants people who are likely to be testifying for either side or at least be deposed by either side?

MR. LYTTLE: Not at this time, your Honor, no.

THE COURT: Are they likely to be picked up not because you are using them affirmatively but because they are a fact witness who is likely to have been mentioned by one side or the other as a likely deponent?

MR. LYTTLE: They have not shown up on any initial disclosures. No. They're not people we're in contact with. They're not people we think will speak to us. We have no reason to believe that any of the people we've redacted will be fact witnesses.

THE COURT: You know who they are, right?

MR. LYTTLE: I have names for some, your Honor. Other times I just have description, Senior Minister in the Ministry of Mines.

THE COURT: To the best you can, if it becomes clear that anyone you've listed you've redacted or been vague on the description in the report is somebody who is otherwise being deposed make sure that you then unseal and redact that piece. As to the rest I'll wait until you make some sort of analysis and make whatever application to me by letter you want to make and we'll see where we go.

MR. BLACKMAN: That actually again segues to the last

point. In terms of people who have been identified in interrogatory responses again we've found through our own research some names from their side of the case who were not identified and some of them I think they've agreed to put in to amend their answers. There's at least one who they're thinking about and, again, just for the sake of good order I'd like to, within a week of today that they either tell us they're going to amend and add things we've asked or else not so we know whether we have a dispute or not.

THE COURT: Agreed?

MR. LYTTLE: Agreed, your Honor. We will add the names they've asked, we're looking into one of them.

THE COURT: Anything else?

MR. BLACKMAN: No, your Honor.

MR. LYTTLE: Your Honor, I have two points if I may.

THE COURT: Yes.

MR. LYTTLE: Just like you asked us and required us to gather the investigator reports, because they were a discrete set of documents, we would ask that Vale be ordered to expedite production on two sets of discrete documents.

THE COURT: Have you talked to them about this yet?

MR. BLACKMAN: No.

MR. LYTTLE: Many times we've been asking for these, the due diligence documents, particularly due diligence reports which I think may inform --

THE COURT: Let's be fair to each other. And if this means you come back a little sooner than you otherwise would, the purpose of these preconference letters is not only for me but it's so that you're not sandbagging the other side unintentionally or intentionally. So unless you think it is desperate that we break that protocol let's save it for the next conference.

MR. LYTTLE: I'm glad to know that's the protocol going forward, your Honor, I'm not sure that's been followed at all times, but we're happy to follow that protocol going forward.

THE COURT: This letter, even though we're still having an hour conference, did seem to get everything to work much more -- much better. You each had your positions in the same letter, not conflicting letters, etc., etc., etc.

MR. LYTTLE: Your Honor, understood.

There is that one -- the feasibility study which I think would help inform our final negotiations on scope, I think it would be helpful if we could get.

THE COURT: What is the feasibility --

MR. BLACKMAN: Again this is sandbagging because one of the things we've been negotiating about is the deal with the scope issue on so-called misappropriated information by giving them this feasibility study. So that's part of a negotiation. Now if you're going to order to produce it, that's not fair.

THE COURT: When you agree to produce it, produce it fast. That's all I'll say. If you don't agree because you don't get whatever the countermaterial or promises, we'll deal with it next time.

When do you all want to come back?

MR. BLACKMAN: We've been doing this on a monthly, more or less, basis.

THE COURT: I'm happy to make it shorter. I'm happy to make it longer. Obviously, I have a certain preference on that but I want to make sure you're getting the judicial help you need even if that help is just if you have a conference you know you've got to resolve other things.

MR. BLACKMAN: I would think in roughly four weeks.

MR. LYTTLE: I propose three weeks, your Honor. There's a lot of balls in the air. I think as we're trying to finalize the coding protocol. And if we're not able to finalize those disputes on scope with Vale, although we're close, it's good to have one on the calendar. I think it will help move the parties along.

THE COURT: If you like being my Friday at 2:00 in the afternoon, we could do it on the 27th. We could do it any earlier day that week, which is a little less than your three weeks at that point, or we can do it -- no we can't do it the week of March 2.

MR. BLACKMAN: I would say the 27th.

THE COURT: All right. 27th at 2:00 work for everyone?

MR. LYTTLE: That's good for us, your Honor.

THE COURT: Okay. Usual drill. Transcript purchased. And I will see you in three weeks. If for some miracle you don't need the conference in three weeks I would not be disappointed to get a letter the Wednesday of that week saying can we push this two or three weeks, Judge, but it has to be a unanimous mutual request.

Thank you all. Usual drill with the purchasing of the transcript.

(Adjourned)